Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Winstar Communications, L.L.C.	)	
Emergency Petition for Declaratory	)	WC Docket No. 02-80
Ruling Regarding ILEC Obligations	)	
To Continue to Provide Services	)	

COMMENTS OF SBC COMMUNICATIONS INC.

Christopher M. Heimann
Gary L. Phillips
Paul K. Mancini

SBC Communications Inc.
1401 I Street, N.W., Suite 400
Washington, DC 20005
(202) 326-8909 – Tel. No.
(202) 408-8745 – Fax No.

Its Attorneys

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SBC Communications Inc. (SBC) strongly supports Verizon's Counter-Petition for Declaratory Ruling that (1) the Communications Act does not except carriers from the rights afforded by section 365 of the Bankruptcy Code, and (2) IDT Winstar's request that Verizon transfer Old Winstar's service arrangements to IDT Winstar through a mere change in names on Old Winstar's accounts constitutes a transfer within the meaning of Verizon's federal tariffs, requiring IDT Winstar to "assume[] all the outstanding indebtedness for such services, and the unexpired portion of the minimum period and the termination liability applicable to such services, if any."[1] SBC also supports Verizon's request that the Commission clarify the circumstances in which a carrier in bankruptcy is required to provide notice of possible discontinuance or transfer to their customers.

[1] Verizon Counter-Petition for Declaratory Ruling at 4, citing Verizon Tariff F.C.C. No. 1, § 2.1.2(a)(1). As noted in SBC's Comments on IDT Winstar's petition, SBC's federal tariffs likewise provide that a customer can "assign or transfer" the use of services provided under the tariff with no interruption of use or relocation of services (i.e., by merely changing the name on the customer's account — as IDT Winstar requests), provided the other customer assumes all outstanding indebtedness for such services, the unexpired portion of the minimum period and the termination liability applicable to such services, if any. SBC Comments at 10. The Commission therefore should clarify that IDT's request also constitutes an "assignment or transfer" within the meaning of SBC's federal tariff.

I. INTRODUCTION AND SUMMARY.

Through its petition for declaratory ruling, IDT Winstar seeks to enlist the Commission in its scheme to avoid its obligations, and subvert the rights of ILECs, under the Bankruptcy Code and the ILECs' tariffs. IDT Winstar argues that, under the Communications Act, it can purchase the assets of Winstar Communications, Inc. (Old Winstar) in bankruptcy, and take the benefits of Old Winstar's executory service agreements with ILECs, without assuming and curing any past debt owed on those contracts, as required under the Bankruptcy Code. In particular, it claims that the Communications Act permits it to formally reject Old Winstar's service agreements with the ILECs (and thus avoid any liability for a cure), but nevertheless retain the benefits of those agreements by requiring SBC and other ILECs to "transition" to it Old Winstar's circuits — with no interruption, relocation or any other change in use of such circuits — through a simple change in billing information. IDT Winstar thus would have the Commission believe that Congress, through the Communications Act, intended to fundamentally alter the right of ILECs by denying them (and only them) the rights afforded to all other innocent creditors in Bankruptcy to require any entity taking the benefits of an executory contract to assume and cure any default on the contract.

However, nothing in the Communications Act or the Bankruptcy Code suggests that Congress had any such intent. There is no statutory language, explicit or implicit, no legislative history, and no case law that supports IDT Winstar's position. To the contrary, the courts have held that the Commission must, to the extent possible, minimize any inconsistency between Commission policy and that of federal bankruptcy law, and protect innocent creditors under its public interest mandate. The Commission therefore should grant Verizon's request, and declare

that the Communications Act does not except carriers from the rights afforded by section 365 of the Bankruptcy Code.

The Commission also should declare that a CLEC that seeks to take over another's service arrangement (whether in or out of bankruptcy) with nothing more than a name change takes an "assignment or transfer" within the meaning of Verizon's and other ILECs' (including SBC's) tariffs, and therefore is liable for the outstanding indebtedness of the prior CLEC for such services. Such a transaction falls within the plain language of the tariff, and is consistent not only with the requirements of the Bankruptcy Code, but also with Commission policy of protecting innocent creditors. As such, the Commission should find that IDT Winstar merits no special treatment and its request to take over the circuits of Old Winstar is subject to the conditions contained in Verizon's and SBC's tariffs.

Finally, the Commission should clarify the circumstances that trigger a carrier's obligation to provide notice to its customers pursuant to section 63.71 of the Commission's rules.

II. THE COMMUNICATIONS ACT DOES NOT ABROGATE THE RIGHTS OF CARRIERS UNDER SECTION 365 OF THE BANKRUPTCY CODE.

The Commission should, as Verizon requests, clarify that the Communications Act does not except ILEC creditors from the rights afforded by section 365 of the Bankruptcy Code. As discussed in SBC's comments, section 365 provides that, if a purchaser wants to take the benefits of an executory contract (such as Old Winstar's service arrangements with the ILECs), the debtor must assume that contract, assign it to the purchaser, and cure any default, including paying any outstanding debt.[2] This provision reflects Congress's determination that a creditor is entitled to the benefit of its bargain, and thus a cure of any outstanding debt on an executory

[2] SBC Comments at 13-14.

contract, if a bankrupt debtor (or its successor) requires the creditor to continue performance through assumption of the contract.[3]

IDT Winstar claims that the Communications Act implicitly erases a century of bankruptcy law, and entitles a CLEC to retain the benefits of a bankrupt CLEC's service agreements with an ILEC creditor without assuming the agreement or paying a cure of amounts owed under those agreements. IDT Winstar further claims that the requirements of the Bankruptcy Code, and section 365 in particular, are irrelevant here, and that the ILECs' refusal to forego their rights under the code constitutes an unjust and unreasonable practice in violation of various provisions of the Act. IDT Winstar thus claims that Communications Act requires that CLECs be treated differently from any other entity purchasing assets in bankruptcy.

IDT Winstar has cited no case, or provision of bankruptcy or non-bankruptcy law to support this remarkable proposition; nor could it. As SBC explained in its comments on IDT Winstar's petition, nothing in the Bankruptcy Code or the Communications Act suggests that Congress intended to afford CLECs unique rights in bankruptcy, or to circumscribe the rights of ILECs as creditors. Absent clear expression of such intent, the Communications Act must be read in harmony with Bankruptcy law, and, moreover, requires the Commission, as part of its public interest mandate, to protect innocent creditors.[4] The Commission therefore cannot, as IDT Winstar requests, read the Communications Act to exclude ILEC creditors and service

[3] SBC Comments at 13-14 (citations omitted).

[4] SBC Comments at 12-13 (citations omitted). *See also Telemundo, Inc. v. FCC*, 802 F.2d 513, 518 (D.C. Cir. 1986) (in considering application to transfer license of bankrupt television station, the FCC is obligated to consider the public interest in protecting innocent creditors); *Fox Television Stations Inc.*, 8 FCC Rcd 5341, 5349 (1993) (acknowledging the Commission's obligation to "minimize, to the extent possible, any conflict between Commission policy and that of federal bankruptcy law").

agreements from the protections afforded by section 365. Nor can it find that SBC's and other ILECs' refusal to relinquish their rights under section 365 somehow is unjust or unreasonable.

IDT Winstar claims that, "if the ILECs were permitted to disconnect service to IDT Winstar's customers simply because IDT Winstar has not assumed Old Winstar's indebtedness with the ILECs, the effect would be to impair IDT Winstar's ability to compete and impose unnecessary costs without any offsetting gain in efficiency."[5] IDT Winstar's claim is a complete *non sequitur*. The issue here is not whether requiring IDT Winstar to live up to its obligations under section 365 would affect its ability to compete. Rather, it is whether Congress intended CLECs to be treated differently from any other purchaser of assets in bankruptcy by permitting them to take the benefits of executory contracts with ILEC creditors without payment of a cure. As discussed above, IDT Winstar has offered no evidence to show that Congress did so intend.[6]

In any event, under IDT Winstar's logic, *any* successor to a bankrupt debtor should be able to take the benefits of *any* executory contract with no provision for a cure. After all, the burden imposed by payment of debt is unaffected by the identity of the creditor. But Congress reached the opposite conclusion, and determined that an innocent creditor is entitled to, and must be paid, a cure if the successor wants to take the benefits of an executory contract between the creditor and the bankrupt debtor.[7] Even IDT Winstar concedes, by its own actions, that other debts of Winstar must be paid. Indeed, IDT Winstar has agreed to pay a cure on at least 4,500

[5] Reply of Winstar Communications, LLC at 13 (IDT Winstar Reply).

[6] To be sure, some entities might not be able to step into the shoes of a bankrupt CLEC if they must pay outstanding debts on the bankrupt's executory contracts. But that is true in any bankruptcy, and IDT has not shown why the balance of equities embodied in section 365 should be different here.

[7] Here, IDT Winstar agreed, by contract, to pay all such cure amounts.

leases for non-residential property, and at least fifteen software licenses.[8] Yet, in those cases, the impact on IDT Winstar of paying a cure would be no different from paying a cure to the ILECs. And, in those cases, a failure to effect a cure would result in termination of the leases and licenses, forcing IDT Winstar to discontinue service to its customers. IDT Winstar offers no reason why a different result should apply here.

Moreover, if the Commission were to buy into IDT Winstar's logic, no successor to a bankrupt CLEC ever would assume an executory service agreement with an ILEC and pay a cure for amounts owed. Why would it if the successor-CLEC knew it could purchase the CLEC's assets and obtain the same circuits and services provided to the bankrupt without interruption and with no liability for a cure? In light of developments in the telecommunications marketplace, IDT Winstar's interpretation would leave SBC and other ILECs holding the bag for untold millions of dollars of bad debt, with no possibility for recovery. Neither SBC nor any other ILEC should be required to absorb such losses. Inevitably, ILECs would be forced to pass these losses on to other ratepayers by raising rates, or reducing investment. Plainly, Congress could not have intended ILEC shareholders and ratepayers to shoulder these losses in order to subsidize entities like IDT Winstar, and certainly would not have so required without making such intention explicit.

IDT Winstar's claim that the ILEC's are seeking to impose unnecessary costs on successors to bankrupt CLECs, and thus damage efficient competitors,[9] is a blatant and spurious attempt to obfuscate the issue by pushing the Commission's buttons. What IDT Winstar terms

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[8] *See, e.g.,* Winstar Communications, Inc., Case No. 01-1430 (JCA) (Jointly Administered) (Bankr. D. Del.), Docket Items 2160–2187; 2190-2220; 2222-2224; 2229-2230 (Docket Sheet attached hereto as Exhibit 1).

[9] IDT Winstar Reply at 13, 20.

"unnecessary costs" are amounts due on services rendered to IDT Winstar's predecessor, services that IDT Winstar seeks to have transferred to it with "a mere billing change."

What is really going on here is that IDT Winstar is attempting to escape its obligations under section 365, *obligations of which it was fully aware, and contractually agreed to assume, when it purchased Old Winstar's debts, and which it specifically acknowledged to the Bankruptcy court*.[10] Indeed, IDT Winstar is trying to change the rules in the middle of the game. In a deal that IDT's Chairman claimed "comes pretty close" to topping the Dutch settlers' purchase of Manhattan for twenty-four dollars, IDT Winstar purchased "almost $5 billion in assets and about $200 million in annual revenue" for only $30-42 million.[11] Other entities may well have considered purchasing those assets for more, but may have been dissuaded from doing so because they recognized they would have to pay creditors (including ILECs)[12] for outstanding debt on executory contracts if they sought to continue serving Old Winstar's customers using Old Winstar's service agreements. The Commission should not countenance IDT Winstar's attempt to alter the rules in midstream.

In light of SBC's and the other ILECs' efforts to work with IDT Winstar to ensure continuity of service to its customers, IDT's claim that the ILECs are trying to damage an

[10] SBC Comments at 5 (citations omitted).

[11] *Id.* at 3, citing IDT Press Release: IDT Corp. Announces the Acquisition of Winstar Communications, Inc., Newark, NJ — December 20, 2001.

[12] Although Section 365 requires the debtor to effect the cure, as a practical matter, the purchaser pays the cure either through a contractual agreement to pay it, as in the case of IDT Winstar, or through an increase in the purchase price to account for any necessary cures.

"efficient" competitor would be laughable if it were not so transparent and self-serving.[13] In fact, SBC and the other ILECs have bent over backwards to try to accommodate IDT Winstar. SBC diligently has sought to negotiate a cure of outstanding debts with IDT Winstar. SBC also repeatedly has stated its willingness to provide services to IDT Winstar, provided IDT Winstar either negotiates a cure on the circuits and services it seeks to transition from Old Winstar or orders replacement circuits like any other carrier. In addition, SBC has cooperated with the Commission and the Bankruptcy court to ensure that service to IDT Winstar's end user customers is not interrupted before this matter is resolved. SBC even has offered to suspend any disconnection of IDT Winstar's government customers until this matter is resolved and to take other measures to ensure those customers' service is uninterrupted. SBC has engaged in these efforts despite IDT Winstar's refusal to engage in good faith negotiations to resolve this dispute, and its failure to pay in advance for all services rendered to IDT Winstar after December 19, 2001, as ordered by the Bankruptcy court.[14] SBC even has offered to submit this matter to binding commercial arbitration. IDT Winstar's claim thus is nothing short of absurd.

The Commission should soundly repudiate IDT Winstar's attempt to enlist the Commission in its scheme to avoid its obligations under section 365. It also should reject IDT Winstar's offensive claims that, by insisting on their rights as innocent creditors, the ILECs somehow are trying to damage so-called "efficient" competitors or impede competition by

[13] IDT Winstar's claim to be an "efficient" competitor is equally absurd, in light of its attempt to get the ILECs to subsidize its take over of Old Winstar by avoiding its obligations under section 365.

[14] SBC Comments at 3. As discussed in SBC's comments, as of mid-April, SBC was owed $2,173,189.89 for services rendered to the Debtors (for the benefit of IDT Winstar) for the period December 19, 20001 through mid-April 2002, and the debt owed has continued to mount unabated. To date, IDT Winstar has submitted disputes totaling only $23,987.00 relating to the amounts owed.

imposing unnecessary costs. Efficient competitors do not acquire $5 billion for $30-42 million and then squirm out of their obligations to satisfy past debt by raising spurious legal claims *post hoc*.

Consistent with long-standing precedent, the Commission must construe the Communications Act in harmony with the Bankruptcy laws to protect innocent creditors to the extent possible. The Commission therefore should clarify that the Communications Act does not create an implicit "telecom" exception to the Bankruptcy Code, and thus abrogate an ILEC creditor's rights under section 365 by permitting a CLEC to take the benefits of a bankrupt debtor's service agreement without payment of a cure.

III. A TRANSFER TO IDT WINSTAR OF OLD WINSTAR'S EXISTING SERVICE ARRANGMENTS CONSTITUTES AN ASSIGNMENT WITHIN THE MEANING OF VERIZON'S AND SBC'S TARIFFS.

The Commission also should declare that, where a CLEC seeks to take another's service arrangements with nothing more than a name change, the transaction constitutes an "assignment or transfer" within the meaning of Verizon's tariffs (and those of other ILECs, like SBC, with comparable tariff provisions), and requires IDT Winstar to assume all outstanding indebtedness of its predecessor.

Verizon's tariff provides, in relevant part, that, where there is no relocation or interruption of service, an assignment or transfer of service may be made to another customer, if the assignee or transferee assumes all outstanding indebtedness for such services, the unexpired portion of the minimum period and the termination liability applicable to such services, if any.[15]

[15] Verizon Reply Comments at 5.

SBC's federal tariff is substantially identical.[16] As Verizon points out, IDT Winstar is "another customer," which is seeking to have Old Winstar's service arrangements transferred to it through a mere change in billing name, and with no interruption, relocation or other change in service.[17] IDT Winstar's request thus falls within the plain language of Verizon's (and SBC's) federal tariffs. Consequently, IDT Winstar must assume all outstanding indebtedness for such services, and the remaining term and termination liability applicable to such services, if any.

IDT Winstar nevertheless questions whether the ILECs' tariffs apply, and claims that, in any event, the tariffs are unjust and unreasonable.[18] First, as discussed above, the transaction IDT Winstar proposes falls within the plain language of Verizon's and SBC's tariffs. Second, the requirement that a successor assume all outstanding indebtedness for services provided to its predecessor is eminently just and reasonable. In particular, it ensures that a CLEC or other end user does not avoid payment for services by simply transferring existing service arrangements to a successor through a mere change in billing information and with no interruption, relocation or other change in service. In addition, because the up-front costs of establishing such service arrangements often are recovered over an extended period of time, and ILECs often provide volume and term discounts in such service arrangements, the requirement ensures that an ILEC fully recovers its costs of providing service and the benefits of its bargain.

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[16] *See* Southwestern Bell Tariff FCC No. 73, Section 2.2.1 ("where there is no interruption of use or relocation of the services [provided under this tariff], [an] assignment or transfer may be made to: (1) another customer . . . provided the assignee or transferee assumes all outstanding indebtedness for such services, the unexpired portion of the minimum period and the termination liability, if any . . ."). The federal tariffs of SBC's other LEC subsidiaries contain virtually identical language. SBC Comments at 10, n. 15 (citations omitted).

[17] Verizon Reply at 5-6.

[18] IDT Winstar Comments at 15-19.

The ILECs' tariff requirement also is wholly consistent with Commission policies. In the context of conversions of special access circuits to combinations of unbundled network elements, the Commission stated that any such conversion "would require the requesting carrier to pay any appropriate termination penalties required under volume or term contracts."[19] The Commission thus has concluded that a CLEC must comply with its service arrangement, and an ILEC is entitled to the benefit of its bargain, where a CLEC converts a service to a UNE. Here, IDT Winstar is seeking to convert many of the services of its predecessor (Old Winstar) through a mere change in billing information. Consistent with the Commission's policy on special access conversions, IDT Winstar cannot circumvent its obligations under Old Winstar's service agreements with SBC by "transitioning" Old Winstar's services to IDT Winstar with no interruption, relocation or other change in service.

The Commission therefore should declare that, where a CLEC seeks to take another's service arrangements with nothing more than a name change, the transaction constitutes an "assignment or transfer" within the meaning of Verizon's tariffs (and those of other ILECs, like SBC, with comparable tariff provisions), and requires IDT Winstar to assume all outstanding indebtedness of its predecessor. The Commission further should reject IDT Winstar's claim that this tariff requirement is unjust and unreasonable.[20]

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[19] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order, 15 FCC Rcd 3696, at para. 486, n. 985 (1999) (*UNE Remand Order*).

[20] To the extent IDT Winstar requests the Commission to declare that SBC's and Verizon's tariffs are unjust and unreasonable, its request is procedurally improper. SBC is aware of no instance in which the Commission has invalidated a tariff through a declaratory ruling.

IV. THE COMMISSION SHOULD CLARIFY THE CIRCUMSTANCES UNDER WHICH CARRIERS IN BANKRUPTCY ARE REQUIRED TO PROVIDE NOTICE OF POSSIBLE IMPAIRMENT OF SERVICE TO THEIR CUSTOMERS.

Finally, the Commission should clarify the circumstances under which bankrupt carriers are required to provide notice of a possible impairment of service to their customers. Section 63.71 of the Commission's rules requires a carrier that seeks to discontinue, reduce or impair service to notify all affected customers of its plans and file an application to discontinue, impair or reduce service with the Commission.[21] If filed by a domestic, nondominant carrier, the application is automatically granted on the 31st day after filing, unless the Commission notifies the applicant to the contrary.[22] Although the Commission thus has required a carrier to provide notice to subscribers at least 30 days before any impairment in service, it has not provided clear guidance regarding the circumstances that might trigger the obligation to provide such notice.

This lack of clarity has enabled IDT Winstar to manufacture an "emergency" designed to threaten its customers with an abrupt termination of service to get the Commission to subvert the rights of ILEC creditors. In particular, despite having four months to decide which of Old Winstar's service agreements it wants to reject, and to provide timely termination notices to customers served pursuant to those agreements, IDT Winstar refused to do so. Rather, it waited until the last possible moment to reject all of its service agreements with ILECs, and failed to provide any notice to its customers that it might reduce, impair or terminate their service. Then, it ran to the Commission when the Bankruptcy Court authorized the ILECs to terminate their service agreements, and asked the Commission to order the ILECs not to terminate their service

[21] 47 C.F.R. § 63.71.

[22] *Id.*

arrangements to prevent abrupt termination of service to its customers. Throughout this entire period IDT Winstar had the ability, and responsibility, to keep its customers apprised of its intentions so that they could take appropriate action to ensure continuity of service. Instead, it embarked on a game of chicken in the hope that the Commission (out of concern for IDT Winstar's customers) would save it from the consequences of its own inaction.

The Commission should not permit IDT Winstar, or any other CLEC, to hold its customers hostage in such a cynical ploy to evade its obligations, and subvert the ILEC's rights, under section 365. In order to prevent any other carrier from engaging in such conduct, the Commission should clarify the circumstances that trigger a carrier's obligation to provide notice to its customers pursuant to section 63.71. At a minimum, a carrier purchasing assets in bankruptcy must notify its customers as soon as it determines to reject executory agreements for services and circuits used to provide service to its customers (unless the carrier, at that time, has alternative facilities available to serve its customers). In addition, as Verizon requests, the Commission should clarify that when a carrier files a Chapter 11 petition and initiates the steps necessary to hold an auction of assets, it must inform customers of a possible discontinuation or transfer of service because a disruption or transfer of service is possible and imminent.[23] For the same reason, a carrier should be required to notify its customers that it will cease or transfer operations when it files a motion in bankruptcy for a sale or acceptance of a purchase agreement. A carrier also should provide such notice when it converts from a Chapter 11 bankruptcy to one in Chapter 7.

[23] Verizon Reply at 7.

As Verizon points out in its comments on IDT Winstar's petition, providing notice in the circumstances outlined above need not result in a loss of customers.[24] When Rhythms filed for bankruptcy, it provided notice to its customer of a possible termination of service, and kept them informed regarding developments in the bankruptcy proceeding, with a minimal loss of customers. Consequently, any fears regarding the consequences of providing notice to customers are unwarranted.

V. CONCLUSION.

For the foregoing reasons, the Commission should grant Verizon's Petition for Declaratory Ruling.

Respectfully submitted,

/s/ Christopher M. Heimann
Christopher M. Heimann
Gary L. Phillips
Paul K. Mancini

SBC COMMUNICATIONS INC.
1401 I Street, N.W., Suite 400
Washington, DC 20005
(202) 326-8909 – Tel. No.
(202) 408-8745 – Fax No.

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[24] Verizon Comments at 21.

Exhibit 1